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August 6, 1997



**BY MESSENGER**

Office of the Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Application by Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan; CC Docket No. 97-137

Dear Sir/Madam:

Enclosed for filing please find an original and six copies of the Reply Memorandum in Support of Joint Motion of MCI, WorldCom, and ALTS to Strike Ameritech's Reply to the Extent it Raises New Matters, or, in the Alternative, to Re-Start the Ninety-Day Review Process.

Thank you for your assistance.

Sincerely,

D. Scott Barash

Enclosures (7)

No. of Copies rec'd 0+6
List ABCDE

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| **In the Matter of** | ) | |
| | ) | |
| **Application by Ameritech Michigan** | ) | **CC Docket No. 97-137** |
| **Pursuant to Section 271 of the** | ) | |
| **Telecommunications Act of 1996 to** | ) | |
| **Provide In-Region, InterLATA** | ) | |
| **Services in Michigan** | ) | |

# REPLY MEMORANDUM IN SUPPORT OF JOINT MOTION OF MCI, WORLDCOM AND ALTS TO STRIKE AMERITECH'S REPLY TO THE EXTENT IT RAISES NEW MATTERS, OR, IN THE ALTERNATIVE, TO RE-START THE NINETY-DAY REVIEW PROCESS

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August 6, 1997

## INTRODUCTION

In order to justify its submission of twenty-eight new affidavits totaling almost two thousand pages with its reply comments in this proceeding, Ameritech has invented a new procedural rule for BOC applications pursuant to § 271 of the Telecommunications Act of 1996 ("the Act"): a BOC need only set forth a *prima facie* case in its initial application, and can then use its reply comments to remedy the deficiencies in its initial application identified by commenting parties.[1] In accordance with its newly minted procedure (but purportedly adopting the standard advanced by movants), Ameritech contends that each and every word of its reply submission is "directly responsive" to the comments of interested parties, the Department of Justice ("DOJ"), and the Michigan Public Service Commission ("MPSC").

Disingenuously portraying itself as a naif at the mercy of the commenters in this proceeding, Ameritech labels the Joint Motion of MCI, WorldCom, and ALTS to strike portions of its huge reply a "litigation tactic" designed merely to "shield their own comments from fair rebuttal." Amer. Resp. at 1. But sandbagging interested parties with reams of new evidence in a reply submission is the ultimate unfair tactical move. The facts are that Ameritech decided both when it would file its application and what material it would include with its application. Only after commenters -- including DOJ and the MPSC -- demonstrated its application to be hopelessly inadequate did Ameritech try improperly to supplement it in reply. Ameritech should

[1] See Ameritech Michigan's Response to Motions to Strike at 4, CC Docket No. 97-137 (filed July 30, 1997)("Amer. Resp.").

be held to the hand it dealt itself, and this motion to strike should be granted in its entirety.[2]

## ARGUMENT

1. Ameritech must rely on the state of the record as of the date of its initial filing. Ameritech grievously misapprehends the requirements of the Act and this Commission's procedural rules governing § 271 applications. Ameritech claims that its initial application was required only to "set forth a *prima facie* case, showing how it has satisfied each of the Section 271 criteria." Amer. Resp. at 4. Arguing that its initial filing needed only to establish a *prima facie* case, Ameritech then contends that its entire reply submission is proper because it all "responds," in some broad sense, to matters raised by commenting parties.

Ameritech's notion that a § 271 application need only establish a *prima facie* case has no basis in the Act or the Commission's procedural rules governing such applications. The Commission could not have been more explicit about the state of the record required:

> We expect that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon. In the event that the applicant submits (in replies or ex parte filings) factual evidence that changes its application in a material respect, the Commission reserves the right to deem such submission a new application and start the 90-day review process anew.[3]

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[2] See Joint Motion of MCI, WorldCom and ALTS to Strike Ameritech's Reply to the Extent it Raises New Matters, or, in the Alternative, to Re-Start the Ninety-Day Review Process, CC Docket No. 97-137 (filed July 16, 1997)("Joint Motion"), and proposed order submitted therewith. See also Motion of AT&T Corp. to Strike Portions of Ameritech's Reply Comments and Reply Affidavits in Support of its Section 271 Application for Michigan, CC Docket No. 97-137 (filed July 15, 1997)("AT&T Motion").

[3] See Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act, Public Notice, FCC 96-469 at 2 (Dec. 6, 1996). See also In the Matter of Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of

The Commission insists on completeness for two compelling reasons: it has only ninety days to evaluate a § 271 application, and interested parties and governmental entities fulfilling their statutory duties to comment must be provided an opportunity to analyze a fixed record. Ameritech chides movants for seeking "to turn the Section 271 approval process into an inherently uneven playing field." Amer. Resp. at 2. But the 271 process is already tilted in favor of the BOC applicant. The BOC decides when it will file an application. The BOC decides what information (and how much information) it will submit, thereby determining the matters to which interested parties will be required to respond. As the Commission has recognized repeatedly, it is hardly unfair to require a BOC to rely on the factual record developed as of the time it filed.

The type of burden-shifting procedure advanced by Ameritech in its response would render the Commission's rules a nullity. Ameritech's *"prima facie* case" standard would, if accepted by the Commission, allow a BOC to submit a bare bones application, purportedly covering all the § 271 criteria, and then wait for other parties to respond before providing complete factual documentation to support its application. As is the case here, interested parties

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1934, as amended, to Provide In-Region, InterLATA Services in Michigan, Order, CC Docket No. 97-1 ¶ 19 (rel. Feb. 7, 1997) ("[b]ecause of the strict 90-day statutory review period, the section 271 review process is keenly dependent on both final approval of a binding agreement pursuant to section 252 as well as an applicant's submission of a complete application at the commencement of a section 271 proceeding.")(emphasis added). In its recent Oklahoma Order, the Commission again stated that "[g]iven the expedited time in which the Commission must review these applications, it is the responsibility of the BOC to submit to the Commission a full and complete record upon which to make determinations on its application." In the Matter of Application by SBC Communications, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, CC Docket No. 97-121 at 36 (1997).

would have no meaningful opportunity to respond to such late-filed evidence. Movants pointed out in their initial filing the danger that BOCs filing future applications will be encouraged to withhold evidence until the reply round of comments. Joint Motion at 10. Ameritech's response demonstrates that this concern was well-founded. And make no mistake: if the improper portions of Ameritech's reply submission are allowed to remain in the record, then future BOC replies are likely to contain even more new material, making this Commission's already difficult and time-pressed job of evaluating § 271 applications that much more so.

2. The only relevant question for this Commission is whether Ameritech satisfied the requirements of the Act at the time it filed its application. Ameritech's response purports to agree with the standard advanced by movants in their opening brief: an applicant may introduce evidence concerning post-application matters only if such evidence is directly and necessarily responsive to matters raised by other commenting parties. Joint Motion at 2; Amer. Resp. at 3. Ameritech vainly attempts to characterize the challenged portions of its reply as "directly and necessarily responsive" to points raised by commenters, but examination of the materials in question consistently demonstrates that they contain new matters that must be stricken. It is simply improper for Ameritech to rely on facts occurring after its application was filed to demonstrate that it satisfied the requirements of § 271 on the date its application was filed. Whether Ameritech subsequently has remedied (or purportedly remedied) some of the defects in its initial application is irrelevant, as are Ameritech's unverified promises that it will fix problems by the statutory deadline for the Commission's decision on its application.

a. Thus, for example, the alleged fact that "[j]ust within the last two

weeks AT&T has submitted thousands of orders which were processed with a high electronic flow-through rate, a low order rejection rate, and without significant performance problems," is irrelevant to the state of the record as of the date Ameritech filed its application. See Rogers Reply Aff. ¶ 9. Ameritech's reliance on AT&T ordering activity during "a recent three day period" -- June 25-27, 1997 -- as further evidence of its checklist compliance, see Rogers Reply Aff. ¶ 39, is similarly improper. Ameritech's discussion of its post-application "platform" trial with AT&T and its one-sided account of the results, repeated citations and references to May and June statistics, and conclusory boasts about the state of competition in Michigan today are also all out of bounds.

b. Even more egregiously, Ameritech claims that its Gates/Thomas Reply Affidavit directly responds to assertions made by the DOJ and competing carriers relating to "the adequacy and performance of Ameritech's OSS interfaces." See Amer. Resp. at 8 n.2. Instead of explaining how these commenters were incorrect as to the facts contained in or existing at the time of Ameritech's application, however, the Gates/Thomas affidavit is based upon an assessment of Ameritech's OSS that was not completed until July 1997, plainly post-dating the application and the comments of interested parties. There is a critical difference -- ignored by Ameritech -- between arguing that commenters were wrong about the state of Ameritech's OSS in May and arguing that Ameritech's OSS was sufficient in July. It is the difference between arguing from a record that has been available to all parties and arguing from new evidence that no other party has ever seen. The fact that commenters have attacked the "adequacy and performance" of Ameritech's OSS in May does not open the door to any and all

evidence intended to bolster Ameritech's argument that its OSS has been improved and satisfies the Act today.

c. In other instances, Ameritech has taken the arguments of commenters to heart and claimed in reply to have solved the problems identified by commenting parties. Thus, in response to TCG's claims about Ameritech's non-compliance, Ameritech asserts that, since TCG filed its comments, agreement has been reached regarding "all major operational issues." Mickens Reply Aff. ¶ 53. Likewise, in response to several commenters, Ameritech contends that it has taken various post-application steps to resolve EOI blocking problems, and that its performance has accordingly "dramatically improved." Mayer/Mickens/Rogers Joint Reply Aff. ¶¶ 75, 83, 101. Ameritech cannot be permitted to submit a plainly defective application and then claim to have resolved only the problems identified in other parties' comments without those claims being subject to verification by interested parties. Nor may Ameritech use the comments of other parties as a blueprint to cure its deficient application during the reply period. That is exactly what the Commission's procedural rules are intended to prevent.

d. Moreover, Ameritech cannot justify its new evidence as necessary to respond to arguments that it could not have been expected to anticipate. The issue is not whether Ameritech has the right to respond to unexpected arguments raised by commenters. The issue is whether Ameritech may do so by introducing entirely new evidence -- and it may not. The fact that Ameritech may characterize the new material as responding to an argument that Ameritech did not anticipate does not immunize it from ordinary procedural requirements, and

such material must be stricken. For example, Ameritech cites MCI's King Affidavit's contentions concerning "Ameritech's position in certain Ameritech/MCI Issue 7.0 implementation meetings" as an unanticipated argument to which it needed to respond. Amer. Resp. at 5. Ameritech was entitled to rebut those contentions on the basis of the existing record. Instead, however, Ameritech submitted and discussed meeting minutes from a meeting that took place on June 23, 1997 -- nearly two weeks after MCI had filed its comments in this proceeding. Id. If MCI mischaracterized Ameritech's position as stated before June 10, 1997, when MCI filed its comments, Ameritech could challenge MCI's characterization by referring to the record that was available to MCI. Minutes from a meeting that post-dates MCI's comments, on the other hand, may not be used to disprove MCI's claims about Ameritech's earlier position. Movants do not demand "clairvoyance" by Ameritech -- only fairness.

3. Nowhere have movants advocated a blanket rule forbidding any reference to post-application matters. Movants did not "swing [their] bludgeon wildly" in asking the Commission to strike new material raised in Ameritech's reply comments. Amer. Resp. at 12. To the contrary, movants carefully identified those portions of Ameritech's reply that do not fairly respond to facts or arguments raised by commenters. The proposed order submitted with the Joint Motion sought to strike only those portions.[4] In those instances where Ameritech limited itself to fair rebuttal, without injecting new evidence or argument, movants did not move

[4] Ameritech's argument that movants failed to specify which portions of its reply submission should be stricken and on what basis should be rejected. Amer. Resp. at 12. Movants submitted a proposed order listing exactly which portions of Ameritech's reply submission should be stricken from the record, and the grounds for striking those portions were set forth fully in the motion.

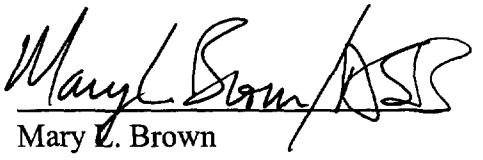
to strike. For example, portions of the Mayer Reply Affidavit directly address and respond to specific points raised by Brooks Fiber and MCI in their comments without reference to any new studies, statistics, or other post-application facts. Mayer Rep. Aff. ¶¶ 50-60. Likewise, portions of the Edwards Reply Affidavit answer specific arguments advanced by DOJ, AT&T, and WorldCom, without relying on any new claims or new data. Edwards Reply Aff. ¶¶ 68-78. Recognizing that Ameritech is entitled to a fair reply, movants voiced no objection to these and many other portions of its submission. Where Ameritech has included improper information in its reply, however, it should be stricken. For example, paragraphs 8 and 9 of the Mayer Reply Affidavit discuss post-application processing of requests as well as continuing negotiations with competing carriers, and paragraphs 7 and 8 of the Edwards Reply Affidavit inject new statistics on the purportedly "exploding" state local competition in Michigan. It is paragraphs of this sort -- those that inject wholly new matters into the record -- that the movants have sought to strike.

4. Implicitly recognizing that the parties should be allowed to respond to the huge amount of new information in its reply, Ameritech suggests they utilize the Commission's *ex parte* procedures. Amer. Resp. at 11. The strict page limits on written submissions, not to mention the fact that the Commission must render a decision on Ameritech's application in approximately two weeks, render this option useless as a practical matter, as Ameritech well knows. Moreover, Ameritech's suggestion that movants adequately addressed this material in their motion to strike is laughable. Amer. Resp. at 11. Movants quite properly limited themselves to procedural issues, and did not discuss any of the substantative shortcomings in Ameritech's reply comments and affidavits.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in movants' opening memorandum, the Commission should strike from the record in this proceeding those portions of Ameritech's reply comments and supporting affidavits identified in the proposed order submitted with movants' opening memorandum. Alternatively, the Commission should restart the 90-day statutory time period for action on Ameritech's application and allow interested parties a complete opportunity to comment.

Respectfully submitted,



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August 6, 1997

## CERTIFICATE OF SERVICE

I, D. Scott Barash, hereby certify that copies of the Reply Memorandum in Support of Joint Motion of MCI, WorldCom, and the Association for Local Telecommunications Services to Strike Ameritech's Reply to the Extent it Raises New Matters or, in the Alternative, to Re-Start the Ninety-Day Review Process and Proposed Order were served this 6th day of August, 1997, by hand (except where otherwise noted), upon each of the following persons:

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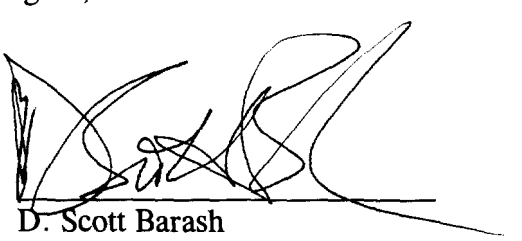

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